

December 19/1765. *Liact*

MEMORIAL

F O R



5. Aug. 1766

Assailzie from

David Ruffel writer in Edinburgh, trustee for the creditors of James Ewart, late merchant in Edinburgh, and accountant to the Royal Bank of Scotland, and John Macintosh junior merchant in London, a creditor of the said James Ewart pursuers;

Sustain the Reasons of Reduction as to Geo. Boyd;

A G A I N S T

Repell the Reasons of Reduction as to Hotchkiss &c.

John Ewart merchant in Dumfries, James Hotchkiss brewer in Edinburgh, George Boyd merchant in Edinburgh, and the representatives of the deceased Adam Cleghorn of Weens, defenders.

THE purpose of the action at the instance of the pursuers, is, to establish an equality among the creditors of James Ewart, a bankrupt.

The history of this James Ewart affords a striking example of the wonderful facility with which credit is obtained, and money lent in Scotland. This man had never any fortune, either original or acquired, born just above the rank of a beggar; he never bettered his circumstances: yet he imperceptibly procured an extensive credit, became a dealer in exchange and a wine-merchant, had his town-house and his country-house, lived elegantly in every re-

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spect, gained nothing, and spent much, and at last broke for L. 10,000 Sterling, and retired into the sanctuary.

Had this been the whole of the history of James Ewart, it might have been said, that he and his creditors were equally inconsiderate; he in borrowing, they in giving credit: but if it shall appear that Ewart was all along perfectly well apprised of his own condition, and foresaw that his bankruptcy was inevitable; that, by a fallacious shew of punctuality in business, he lulled his most considerable creditor, who resided at a distance, into a fatal security; that having once drained him to the utmost farthing, he *then* resolved to stop payment, clandestinely communicated his resolution to some few favourite creditors, who resided in the same place with himself; clandestinely informed them what persons were his debtors, and gave those favourites an opportunity of attaching his subjects by early diligence; and after having accomplished this plan, retired with his books into the sanctuary: If these things shall appear, then Ewart will be held as worse than *inconsiderate*, and his postponed creditors will be held as *deceived*.

Whether this be a just representation of the case, will best appear from the following recital of facts.

Jan. 20. &
22. 1763.

Adam Cleghorn of Weems, James Hotchkis brewer in Edinburgh, and John Ewart merchant in Dumfries, became engaged with James Ewart to the Royal Bank for a cash-account, to be kept in James Ewart's name, to the amount of L. 1500 Sterling.

June 30. 1763

James Ewart granted a bond of relief in favour of his obligants: this bond still remains unregistered.

Nov. 8. 1763.

By a stated account made out of Ewart's orders and payments, it appears, that the whole sum of this credit was drawn and due on the 8th November 1763; and that from that time forward, there were no operations whatever upon his account, not a farthing replaced to his credit.

Ewart had, in the course of his business, become a correspondent

spondent of John Macintosh junior, merchant in London: He kept up a great shew of exactness in his remittances; and thus, by what may be termed a *mercantile hypocrisy*, established his character with a stranger.

Meanwhile Ewart, as he himself has acknowledged at your Lordships bar, "never carried on his books regularly, nor balanced them in the course of his trade;" and as "he began his trade without any stock, so was always fighting to support credit."

The manner in which he *fought* to support his credit at last, was this: He drew bills of exchange upon John Macintosh to the amount of no less than *Three thousand six hundred pounds Sterling*. This he did within a few weeks of the time at which he stopped payment. By negotiating those bills on the exchange of Edinburgh, he received every shilling of this great sum. How he applied the money so received, is a question which will probably remain for ever undecided. One thing is certain, and acknowledged by Ewart himself, "That two or three posts before he stopped payment, he received a letter from Mr Macintosh, acquainting him that he Macintosh was so much straitened by his being so greatly in advance, that he would be obliged to draw upon the declarant at five *per cent.* exchange; and as the declarant could not procure any money, he then saw that of necessity he must stop payment as soon as such bills came upon him."

It was highly unjust in Ewart to abuse the confidence placed in him by his correspondent, and to contract so very large a debt even at the eve of certain insolvency. The creditor whose confidence was thus abused, not only resided at a distance, but was utterly unable to procure any payment of the debt so contracted: for your Lordships will observe, that the only documents of the debt due to John Macintosh were bills drawn and accepted; and many of them were so lately drawn, as not to be payable for upwards of a month after Ewart's failure. Thus was Mr Macintosh deluded into the acceptance

ceptance of bills to the amount of L. 3600 Sterling, and at the same time prevented from making his recourse good against Ewart. But what is worst of all, thus was Ewart enabled to collude with favourite creditors, and to divide his subjects among them, in what order, or by what proportions, he thought fit.

When Ewart found himself a bankrupt beyond possibility of resource, he had one course to follow, and one only; to retire into a sanctuary, to call his *whole* creditors together, and to declare himself a bankrupt. This was the only atonement which he could make for having so long "fought to support credit." A most dishonourable warfare, in which he had so long persisted!

Had Ewart instantly retired to a sanctuary, had he called all his creditors together, and honestly confessed his bankruptcy, he would have been pitied, if not excused: his creditors would have divided equally among them the miserable remains of his scanty fortune. This was a plain track, in which an honest man, however inconsiderate, would have walked. Your Lordships will now hear how far what Ewart ought to have *done* was different from what he *did*.

Mar. 28. 1764 On the 28th March 1764, he borrowed L. 200 Sterling from Mess. Foggo and Galloway, merchants in Edinburgh, promising to repay them next day, under the *false* pretence of expecting remittances; he also got L. 300 Sterling from Mr Archibald Stewart merchant in Edinburgh, upon discounting of bills: being possessed of this sum he repaid with it a like sum, which he had borrowed from the teller of the Royal Bank. This was an example of gratitude to his benefactor, who had put the money of many individuals into his hands, that might have deserved greater praise, had it been less detrimental to other creditors equally onerous.

After having discharged this obligation of gratitude, the next person with whom he had any transactions was his brother-in-law George Boyd. Ewart declares, That "he met him
" in

“ in the Lawn-market, who insisted for payment of L. 220
 “ Sterling due to him by the declarant; upon which the de-
 “ clarant said, *That he was in such a situation as obliged him to*
 “ *stop payment*, and he could do nothing for him; but if
 “ some bills could be of any use to him, he might take them;
 “ and carrying Mr Boyd into his own room in the Lawn-
 “ market, he indorsed him bills to about the extent of
 “ L. 260 Sterling:—That he neither retired the grounds
 “ of debt, nor took any receipt, or obligation for the bills
 “ from Mr Boyd.”

Mr Boyd, one of the defenders, has acknowledged the substance of Ewart's declaration to be true. He says, “ That
 “ on the 28th (29th) March 1764, he went to Mr Ewart's
 “ house, knowing nothing earthly of his affairs, or being in
 “ the least suspicious of his insolvency; and he being abroad,
 “ Mr Boyd inquired at Mrs Ewart, if she knew if he could
 “ pay the money borrowed a few days ago? To which she
 “ answered, that she knew not, but she heard him say he
 “ was much straitened for money: That about two
 “ hours after this, he was sent for to Mr Ewart's house,
 “ where he told him, he could not give him cash, but,
 “ which was the same thing, he would give him bills ac-
 “ cepted by good men.” Mr Boyd adds, That Ewart gave
 him bills to the amount of L. 280, and ordered him to in-
 dorse them to himself; and that he Mr Boyd would un-
 doubtedly have discharged the debts due to him by Ewart,
 “ but the confusion Ewart was in, made him withdraw with-
 “ out doing it, *calling out there were so many demands upon*
 “ *him:*—That towards the evening of that day, or next
 morning, “ he was *surprised* to hear Mess. Hotchkis and Cleg-
 “ horn, and others, were doing diligence; and on further
 “ inquiry found Mr Ewart had stopped payment.”

Ewart having thus cleared with the tellers of the bank,
 and given what security he could to his brother-in-law, pro-
 ceeded to give his best assistance to *two* of his creditors, Mess.

Cleghorn and Hotchkis, for the payment of their joint obligation to the Royal Bank in his favour.

As the present question does, in a great measure, turn upon the nature of the transactions with Mess. Cleghorn and Hotchkis, it will be necessary to make a recital of the fact, as acknowledged before your Lordships by Ewart himself. Your Lordships will remember whether his behaviour was that of a man speaking from recollection, or of one who was willing to charge himself with more offences than he had really committed, in order to favour the majority of his creditors, to the prejudice of particular favourites or confidants.

Mar. 29. 1764 He declared, " That on the morning of the 29th March, " he called at the house of Mr John Syme writer to the signet; and being told that he was in Edinburgh, about ten " o'clock that same morning he went to the house of Mr " James Hotchkis brewer, and told him, that *now of necessity he must stop payment*: That Mr Hotchkis desired the " declarant to go to his house at Stockbridge, where he and " Mr Adam Cleghorn would follow him; and accordingly " they came to him there, betwixt eleven and twelve, and " told him it was now necessary to take hold of his wines; " and to render the matter more easy, would carry the " wines from Stockbridge, and put them into one cellar at " Leith: That the declarant then said, *Why would they do so? it would put matters in confusion*; but Mr Hotchkis insisted farther, that the declarant *should acquaint them where his other effects were; which he, being in a panick, accordingly did, by telling what persons were indebted to him, whose names and sums Mr Hotchkis took down in writing*; which " note the declarant gave from his memory; and, as he " thinks, the sums might be about L. 1500 Sterling, or " thereby." And being interrogated, " Why he so early " communicated his situation to Mr Hotchkis, and to none " other of his creditors? declares, That on missing Mr Syme, " that

“ that Mr Hotchkis was the person in whom he put most confidence in for advice, though he has met with very different treatment from him than he expected.” — “ And *being interrogate, If he did not understand that the notes of his debtors names, and sums demanded by Hotchkis and Cleghorn, was in order to enable them to proceed in diligence ? declares, He did so understand and believe ; but that he was glad to do any thing.*”

Mess. Hotchkis and Cleghorn did not delay a moment in Mar. 29. 1764 profiting by this friendly intimation which Ewart had made to them, “ *That now of necessity he must stop payment.*” On that very day they took out an admiral-precept, in their own name, and in the name of John Ewart merchant in Dumfries, their co-obligant, reciting their obligation to the bank, and Ewart’s bond of relief.

In consequence of this, they used arrestments in the hands Mar. 29. 30. & 31. April 2. & 3. 1764. of Ewart’s creditors, upon the 29th, 30th, 31st days of March, and 2d day of April, 1764; and as in that year the 1st of April fell upon a Sunday, it is obvious, that there was not a moment lost; and that the diligence was as expeditious as could possibly be devised.

They also used arrestments in the hands of the same debt-Apr. 4. 1764. ors, proceeding, by authority of your Lordships, on the unregistered bond of relief.

The bank conveyed the bond for L. 1500, together with interest, amounting to L. 83 : 9 : 9, to Mess. Hotchkis and Cleghorn.

Upon the bond, assignment thereof, and bond of relief, Apr. 5. 1764. Mess. Cleghorn and Hotchkis obtained letters of horning against Ewart; and the letters were executed that same day.

The wines and rum belonging to Ewart were poinded up-Apr. 12. 1764. on this horning, viz. two hogshheads of claret, at L. 42, and 98 gallons of rum, at 7 s. the gallon, amounting to L. 34, 6 s. Sterling.

The household-goods at Stockbridge belonging to Ewart, Apr. 13. 1764. together

together with some wines, and other liquors there, to the amount of L. 275 : 1 : 3 Sterling, were poulded also upon the same diligence.

Apr 18. 1764. In like manner, the household-furniture in Ewart's house at Edinburgh, to the amount of L. 124, 5 s. Sterling, was poulded.

From the execution of this last poulding, it appears, that Angus Macdonald, another creditor, claimed to be conjoined in the poulding, after that the messenger had apprehended the goods, but before they were carried to the market-cross for the second appraisement; but that this claim was refused by the messenger.

July 13. 1764. That the whole of the diligence done by Mess. Hotchkis and Cleghorn may be seen at one view, it is fit to observe, that on the 13th July 1764, they obtained decret before the High Court of Admiralty for payment of the bank-debt. But this decret is in absence, upon a cause neither maritime nor mercantile. And besides, it is, in another respect, erroneous; for it goes out in the name of John Ewart, as well as of the other two sureties, although the assignment from the bank be taken to Mess. Cleghorn and Hotchkis alone.

It will now be proper to state the nature of that diligence which was done by George Boyd, Ewart's brother-in-law. Your Lordships have heard, that when Ewart indorsed the bills to Boyd, he neither retired the security which he had formerly granted to Boyd, nor even took receipts for the bills so indorsed.

It appears, that those bills were indorsed to Boyd by indorsations filled up with Boyd's own hand; and that most of them were again indorsed by Boyd to one Brown.

Boyd, however, being advised, that his transactions with Ewart were liable to challenge, endeavoured, by another method, to establish his preference.

Apr. 2. 1764. He took out a libel, before the sheriff of Edinburgh, against

gainst Ewart, concluding for payment of " L. 100 Sterling
 " of principal, contained in his promissory note dated 14th
 " December 1762, as a balance due by him to the pursuer at
 " settling accounts at the date thereof, and interest thereof,
 " *nomine damni*, from the date thereof, and in time coming
 " during the not payment." The promissory note bears " at
 " settling *all* accounts." Why the word *all* was omitted in
 the libel, will hereafter appear.

He concluded also for payment " of the sum of L. 114
 " Sterling, contained in the said James Ewart's accepted bill
 " to the pursuer, dated 14th of March last (1764), payable
 " one day after date, and interest thereof since the 15th of
 " the said month of March last, and during the not payment,
 " with L. 42 Sterling of expences of plea." This libelled
 summons contained warrant for arresting.

Boyd accordingly used arrestments in the hands of the Apr. 2. & 3.
1764.
 debtors in the bills.

He obtained decret against Ewart on the dependence. Apr. 4. 1764.

His next step was, to bring an action of forthcoming a-
 gainst the debtors in the bills. And here your Lordships
 will give your attention to the farce conducted between Boyd
 and his brother-in-law, the bankrupt. In the action of
 forthcoming, some of the debtors failed to appear: although
 Boyd had received the bills from the bankrupt himself, and
 had filled up the indorsations in his own name; yet he took
 a diligence against the bankrupt for recovering them out of
 his hands. And the decret of forthcoming bears, " That Apr. 11. 1764.
 " in consequence of the said interlocutor granting diligence,
 " and the same being shewn to the said James Ewart, he pro-
 " duced the six bills before narrated, accepted by the defend-
 " ers, in the forthcoming."

Boyd upon this did obtain decret of forthcoming. Apr. 25. 1764.

By means of this collusion, and the discovery thereby
 made of the debtors of the bankrupt to his own brother-in-
 law, has Boyd recovered a considerable sum of money.

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Apr. 16. 1764. Boyd raised and executed another libel against Ewart, for payment of L. 100 Sterling, contained in a bill of exchange drawn by Ewart, accepted by John Armstrong of Wrae, indorsed for value by Ewart to Boyd, and again indorsed by Boyd to James Boutchart merchant in Arbroath; "which bill," as the libel bears, "the complainer has reason to fear either "has [not been], or will not be paid by the person upon "whom it is drawn; so that it must come back upon the "complainer, who will be obliged to pay the same to the person he gave it to, whereby the complainer is intitled to recourse against the said James Ewart, and who is liable to "him of [in] the said principal sum, annualrents, exchange, "and re-exchange."

This libel also contains a conclusion for payment of L. 49, 9 s. 7 d. Sterling of principal, and interest from 22d September 1762. The narrative as to the nature of this debt is conceived in the following words: "Likeas the said James Ewart, "by his missive letter, bearing date 22d September 1762, "addressed to the complainer, acknowledges, that he was "owing to the complainer L. 49: 9: 7 Sterling money, which "was contained in an account due by William Lockhart, "grandson of William Lockhart of Wickinshaw, to the complainer, and *obliged himself to pay the same with interest* to "the complainer from the date of the said letter."

Thus did Boyd first obtain decret for L. 100 contained in a promissory note in December 1762, being as the balance "at settling *all* accounts;" and then, bring a new action for payment of upwards of L. 50, contained in an obligatory missive dated September 1762. This is the more extraordinary, because Boyd did, before the Lord Ordinary, declare, under his hand, that he received the promissory note December 1762 "*in full of all Ewart owed him at that time.*"

The libel of the 16th April 1764 contains warrant for arresting; and, in consequence thereof, Boyd used arrestments in

in the hands of Campbell, Rattray, and Sconces, three of the debtors in the bills above mentioned.

Such is the nature of the diligence used by Mess. Hotchkis and Cleghorn, and by Boyd: It may be fit, in a very few words, to state the nature of the diligence used by John Macintosh upon his great debt of L. 3600 Sterling.

This debt took its rise from dealings between Ewart and Mr Macintosh, who resided at London, and was altogether *in re mercatoria*. Macintosh therefore proceeded to constitute it before the High Court of Admiralty, and obtained decret ac-Apr. 17. 1764. cordingly. On this decret horning and caption were raised.

After that Ewart's effects within reach had been attached by his favourite creditors, in consequence of the collusive transactions already mentioned, he thought fit to execute a trust-deed for behoof of his creditors. The conveyance was Apr. 25. 1764. to James Spence, and failing him to David Ruffel, one of the pursuers. And as James Spence declined to accept, the trust has devolved on David Ruffel.

About the beginning of June 1764, Ewart withdrew from the sanctuary, and was imprisoned in the tolbooth of Edinburgh, by virtue of the letters of caption obtained at the in-June 14. 1764. stance of John Macintosh.

Upon an application to your Lordships, in name of John June 16. 1764. Macintosh, Ewart was brought to your Lordships bar, and underwent a long examination in presence. It would appear, that he did not clear himself of the charge of fraud brought against him; for your Lordships saw cause for remitting him to prison, there to remain until liberated *by a special warrant of court*.

Ewart did thereafter insist in a *cessio bonorum*. The pursuer John Macintosh had reasons for opposing this *cessio*; but some neglect having happened as to consignation of the aliment, Ewart was intitled to demand his liberty, and was accordingly liberated without waiting the event of the *cessio*.

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All the creditors of Ewart, excepting those favoured by him, have acceded to the trust-right, to the effect of divesting the bankrupt, and of intitling the trustee to levy the effects for their common behoof.

An action has been brought into court by David Ruffel the trustee, under the authority of the acceding creditors, and by John Macintosh personally, concluding, That Ewart should be declared a *notour bankrupt*, in terms of the statute 1696; that the collusive diligences and securities obtained by certain confident creditors of Ewart, in consequence of his fraud and theirs, should be reduced; and that they should be decerned to pay the sums which they have received, by virtue of the diligence thus used, and the securities thus obtained, to the pursuer David Ruffel, for behoof of the whole creditors.

The cause was called before the Lord Gardenston Ordinary; the parties were heard; there were given in before his Lordship, a condescendence for the pursuers, answers for Mess. Hotchkis and Cleghorn, and answers for George Boyd.

July 16. 1765. The Lord Ordinary was pleased to pronounce the following interlocutor: "Having again considered this condescendence, "and answers thereto, makes avifandum therewith to the "Lords, and appoints both parties to give in memorials to "the Lords."

In obedience to the interlocutor of the Lord Ordinary, the following memorial is humbly offered on the part of the pursuers.

The consequence of the present question is briefly this: Either all the creditors of Ewart will share in an equal dividend of his subjects; or his favourite creditors will draw their payment, in consequence of the aid afforded to them by the bankrupt, while his other creditors, to the amount of L. 8000, will draw no more than their equal dividend of L. 1200, the value of his heritable subjects.

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In treating of this question the pursuers will not rest their plea upon the statute 1621, nor even upon the statute 1696, excepting in so far as Boyd may be concerned. They will refer to that equity and sound reason upon which the Civil law proceeded, and upon which the judgment of your Lordships always proceeds.

An observation made by Sir George Mackenzie in his Commentary upon the act 1621, is well known: it is expressed not only with his usual elegance, but with a precision unusual. "In laws which are founded upon the principles of reason, extensions from the same principles are very natural; and in laws which are introduced for the obviating of cheats, extensions are most necessary; because the same subtle and fraudulent inclinations which tempted the debtor to cheat his creditors, will easily tempt him likewise to cheat the law, if the wisdom and prudence of the judge did not meet him where-ever he turned."

According to Sir George Mackenzie's expression, the pursuers intreat your Lordships, "to meet this bankrupt where-ever he turns," and to meet those creditors who endeavour to turn with him.

What was the condition of Ewart on the 29th March 1764? what ought to have been his conduct? and what the conduct of his creditors? Upon the determination of these questions it is that the cause now before your Lordships does in a great measure depend.

On the 29th March 1764, Ewart knew himself to be irrecoverably bankrupt: as he had never balanced his books, he could not know to what depth of ruin he was sunk, but he knew himself ruined; he was sensible that to answer the just demands of his creditors, and particularly of John Macintosh, was impossible; that phantom of credit, to which he had hitherto owed his protection, was now about to abandon him for ever; although he had never deceived himself,

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yet he had deceived the persons who had the misfortune to be connected with him in trade.

What ought to have been his conduct in such circumstances is obvious. He had two paths to follow : either the plain and direct one, of openly telling all his creditors without reserve that he was a broken man ; or the other, of giving this information to some few favourite creditors. By following the former course, he would have put all his creditors upon an equal footing, and have enabled them to join in common measures, for the behoof of all concerned ; by following the latter course, he might enable some particular persons to use precipitate diligence, and to attach his effects in the hands of those indebted to him.

This measure, of making an unlimited and impartial discovery of the state of his affairs, was so natural in itself, that it must have been the first that occurred to his mind ; he could not have acted wrong, but upon thought and mature deliberation.

Unhappily for him, he deviated from the right course, and proceeded from one act of fraudulent partiality to another, until he had preferred his favourite creditors, and left the others no remedy but that of the law ; a remedy which cannot be obtained without hurt to his own character, and without reflecting on the few creditors whom he favoured.

His first step was, to borrow money from Foggo and others, in order to satisfy the debt due to the tellers of the bank. This was unpardonable in him, because he knew that he was not able to repay what he had so borrowed ; and indeed, as appears from his declaration, had not the most remote intention of repaying. The tellers of the bank were not to blame in receiving satisfaction of their debt : they knew nothing of his circumstances, of what he had done, or of what he intended to do : it was not consistent with his plan to make them acquainted with his bankruptcy ; *that* would have

have tied up his hands at once, and prevented him from establishing any undue preference among his creditors.

His next step was, to procure a most injurious preference to George Boyd his brother-in-law: He directly confessed to Boyd, that he was obliged to stop payment, but that he would put indorsed bills into his hands; and though, according to Boyd's own assertion, the debt due was but L. 220, Ewart put indorsed bills into his hands to the amount of L. 280; at the same time Ewart was so very careless of his other creditors, that he neither retired the documents of debt, nor took receipts for the bills indorsed in payment.

The next step which Ewart proposed to take, according to his own account of the matter, was right and unexceptionable; that of informing his agent, Mr John Syme, of his absolute and irrecoverable bankruptcy. It happens, however, that the only right step which he ever proposed to take was not taken. It seems Mr Syme was not in Edinburgh; and it never occurred to Ewart, that though Mr Syme was not, yet that some man of confidence, intrusted with Mr Syme's affairs, must have been in town; neither did it occur to Ewart, that he must have had many impartial acquaintance in Edinburgh, capable of advising him, if he needed advice, in Mr Syme's absence. Had he mentioned his condition to any of his brethren in the bank, there would have been little occasion for this action.

Instead of seeking any advice from disinterested persons, he immediately repaired to Hotchkis, one of his creditors, and told him, "*That now of necessity he must stop payment.*" Hotchkis desired him to go to his house at Stockbridge, where he, and Mr Adam Cleghorn, another creditor, bound with Hotchkis, would follow him. Accordingly they came to Ewart, in an hour or two after; told him, it was now necessary to lay hold of his wines; and proposed to convey them to Leith. Hotchkis "insisted farther, that Ewart should acquaint them where his other effects were; which he, being
" in

“ in a panick, accordingly did, by telling what persons were
 “ indebted to him; whose names and sums Mr Hotchkis
 “ took down in writing.” Ewart understood that “ this was
 “ in order to enable them to proceed in diligence:” And he
 adds by way of palliative, in his declaration, “ That he was
 “ glad to do any thing”

As Ewart understood, so it was: Mess. Hotchkis and Cleg-
 horn proceeded to the most expeditious diligence, and in
 consequence thereof, arrested in the hands of those very debt-
 ors whose names and debts had been so officiously communi-
 cated by Ewart.

In the answers made for Hotchkis and Cleghorn it is said,
 that Hotchkis was much incensed at Ewart; and when he
 asked his advice, that Hotchkis “ advised him to hang him-
 “ self, which was the English way.” But notwithstanding
 this advice, perhaps not proper to be repeated in a court of
 justice, it is acknowledged that Hotchkis gave him the other
 advice, of going to Stockbridge; and as Hotchkis and Cleg-
 horn immediately followed him to Stockbridge, there can re-
 main no doubt, that Ewart spoke truth to your Lordships,
 when he declared, that they had appointed to meet him there.

The conversation about the necessity of taking hold of his
 wines, is denied by Hotchkis and Cleghorn: whether their de-
 nial or Ewart’s narrative be most natural, is submitted to your
 Lordships.

One thing was insinuated before the Lord Ordinary,
 and may possibly be repeated, “ That it is humbly sub-
 “ mitted, how far a declaration taken from a person who
 “ was summarily brought before the court, to answer as to
 “ facts which had happened at the distance of several months,
 “ without any previous notification of what he was to be ex-
 “ amined upon, or time given him to recollect himself, and
 “ under all the confusion which one is apt to fall into on
 “ such an occasion, can pass for an unexceptionable evi-
 “ dence.”

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The answers to this observation are drawn, *1st*, From the justice of your Lordships, who will not permit any one to be examined at your bar while in confusion, and without due recollection: *2dly*, From the tenor of the declaration itself, which is distinct and explicit. The defenders are greatly mistaken, if they suppose, that much previous recollection is necessary, in order to enable a man *to speak truth*: The practice itself, of taking judicial declarations *de plano*, supposes the contrary.

The fact as to taking down the names of Ewart's debtors, and the extent of the debts, is acknowledged: but an excuse is made for it, which shall be given in the words of Mess. Hotchkis and Cleghorn themselves. It is said, That, after various conversations, "Mr Hotchkis proceeded to interrogate him concerning the debts which he had informed him was owing at the time those papers [the rights to Ewart's heritable subjects] were sent him; and received for answer, That these debts were still owing; and that some of them were good, and some of them were bad. They then proceeded to ask him more particularly concerning those debts; and as they were informed of some other persons with whom Ewart had had dealings, and who owed him money, they interrogated him likewise concerning them, particularly Nathaniel Duke, Mr Scot of Shelfhill, and others; and, after all, they asked him a general question, Whether any other person owed him money? and they received information but of one debtor of his, whom they knew not of before, by means of this conversation, *viz.* one Neil Mac-kellar near to Inverary."

With respect to this apology, your Lordships are intreated to observe, *1st*, That if Hotchkis became bound with Ewart upon the faith of his heritable subjects, as he has repeatedly asserted before the Lord Ordinary, it was odd, that he should at that time have inquired, who were his personal debtors. *2dly*, As so long a time intervened between his receiving those

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papers, 30th June 1763, and this conversation 29th March 1764, it was odd to suppose, that the same debts, if unexceptionable, still remained outstanding. *3dly*, It is very particular, that they, whose transactions in business were so little connected with those of Ewart, should be so specially informed of Ewart's debtors; and still more particular, that they should be able to recollect their names. *4thly*, It is acknowledged, that Ewart did not, at the Stockbridge conference, make mention of all his debtors; but that Mess. Hotchkis and Cleghorn afterwards came to be informed of some debtors whom Ewart had omitted to mention. Now, it is beyond measure strange, that Mess. Hotchkis and Cleghorn should remember, or not remember, just as Ewart did, with the single exception of one man: Nay more, that they should mistake just as he mistook, as in supposing Scot of Shelfhill to be Ewart's debtor, while he was not. *5thly*, and *lastly*, It is natural to suppose, that the names of the debtors were taken down in the order of inquiry; that is, first the old debtors; next, Scot of Shelfhill, Nathaniel Duke, and the others of whom Mess. Hotchkis and Cleghorn had heard; and lastly, Mackellar, the only person of whom they had not heard. Now it happens, that the list in question has been exhibited by Hotchkis; and the very first name that occurs is "Neil Mackellar near Inverary, L. 255;" whereas, according to the hypothesis of the defenders, his name ought to have been last inserted. The second name in the list is "Robert Scot of Shelfhill, L. 45;" whereas all the supposed old debtors, concerning whom the original inquiry was, ought to have been inserted before him.

Thus it appears, that Ewart, with less previous recollection, gave your Lordships a fuller narrative of the proceedings at Stockbridge, than the defenders have been able to do. And indeed, as the inquiry before your Lordships chiefly concerned Ewart, and as his declaration preceded the answers
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for Mess. Hotchkis and Cleghorn in a full year, it is no wonder, that his account should be more accurate than theirs.

So much having been said as to the fact respecting Mess. Hotchkis and Cleghorn, the pursuer will beg leave to make the following deductions, naturally arising from it.

1mo, It would seem, that so exact an inquisition made into a man's debtors, followed by instant diligence upon the debts due, has all the appearance of a previous ignorance of those debts, not of a previous knowledge; and when such *useful* inquisition is made *remotis arbitris*, and without the knowledge of the other creditors, concerning one who privately confesses, that *now of necessity he must stop payment*, it cannot, in fair construction, be interpreted otherwise, than as a collusive transaction between the *fraudator*, as the Roman law terms the bankrupt, and his favoured creditors.

If the diligence done by Mess. Hotchkis and Cleghorn, in consequence of information thus received from Ewart, should be sustained, your Lordships will at once perceive, what must be the inevitable consequences: Whenever a person perceives himself to be irretrievably bankrupt, he will have it in his power to confide this secret to any one of his creditors, to point out the names of his debtors, to specify his effects, to give information where, and by what diligence they are attachable. The knowledge of such secrets, even for a single day, will be sufficient to enable the creditor intrusted to proceed in diligence; and, according to the hypothesis of Mess. Hotchkis and Cleghorn, will be sufficient to disappoint other creditors equally onerous, though not equally well informed.

Suppose that Ewart, instead of giving his information from memory, had taken his books with him to Stockbridge, in the same manner as he afterwards took them to the sanctuary, the only difference would have been, that his information to his confidant might have proved more exact and copious. But information given from memory, served the purpose just as well as information from books would have done.

done. Now, will Mess. Hotchkis and Cleghorn assert, that it would have been lawful for Ewart to have exposed his books to them, without the knowledge and participation of his other creditors? and that it would have been lawful for them to have done diligence, as they might be directed from inspection of those books? If they assert this, it will be incumbent on them to show, how the creditors of a bankrupt can come in *pari passu* for their respective debts, if the bankrupt should be inclined to shew a partial favour to any one of their number. If they acknowledge, that such information if given by Ewart from his books, would have been unlawful, it will be incumbent on them to show, what difference there is, in its consequences, between the supposed and the real case.

The Roman law, upon the reasons of equity, provided against all collusive devices and contrivances between the bankrupt and his favoured creditors. This was in an especial manner provided against by the noted edict, *Quæ fraudationis causa gesta erunt*; concerning which there is a whole title in the Pandects; and Ulpian, in explaining the words *quæ fraudationis causa gesta erunt*, thus speaks, *Quodcunque igitur fraudis causa factum est, videtur his verbis revocari, quaecunque fuerit; nam late ista verba patent*; l. 1. § 2. D. d. t. And again, l. 10. § 5. *Quod ait prætor sciente, sic accipimus, te conscio et fraudem participant.*

The pursuers, instead of multiplying passages to the same import, will beg leave to observe, that the conference at Stockbridge, and the consequences thence arising, seem to fall directly under the words of the edict, as explained by the Roman lawyers; and if those lawyers have proceeded upon the reasons of equity and good faith, the pursuers are assured, that your Lordships judgment will concur with theirs.

There is one particular exception which the Roman lawyers make; and it seems a most just exception: *Ita demum revocatur,*

vocatur, quod fraudandorum creditorum causa factum est, si eventum fraus habuit; l. 10. § 1. D. d. t. Under this exception indeed the case of Mess. Hotchkis and Cleghorn may fall; for the pursuers will now endeavour to shew, that the diligence done by them in consequence of Ewart's collusion is absolutely inept: and this is a separate consideration which the pursuers beg leave to suggest, independent of the circumstances of connivance and collusion occurring from the facts as already recited.

Your Lordships have heard of the admiral-precept 29th March 1764, reciting the obligation to the bank by Mess. Hotchkis, Cleghorn, and John Ewart, and the bond of relief to them by James Ewart; you have also heard of the arrestments used in consequence of this precept; and of the decret in absence obtained before the admiral by Mess. Hotchkis and Cleghorn. Now the pursuers humbly apprehend, that all this diligence was inept, and can have no consequence in law.

Ewart the bankrupt was debtor to Mess. Hotchkis and Cleghorn, by his bond of relief, and in no other way whatever. The admiral's precept, and all the diligence consequent thereon, do relate singly to this bond of relief; so also does the decret in absence obtained before the admiral.

In causes mercantile and maritime, the admiral has an original jurisdiction. An action on a bond of relief to co-obligants in a bond to the bank, is a cause neither maritime nor mercantile. It must be acknowledged, that decret may pass before the admiral-court in causes neither maritime nor mercantile; but *this* is only in consequence of the consent of parties, appearing, and thereby prorogating the jurisdiction of the court; and therefore, if such decret passes in absence, it is void. Now, so it happens, that the proceedings before the admiral were wholly in absence: the bankrupt, though he aided Mess. Hotchkis and Cleghorn in the preliminaries to the proceedings before the admiral, yet he omitted to aid

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them with his appearance for prorogating the jurisdiction of the admiral.

And here it will be necessary to observe, that the pursuer John Macintosh did not fall into the like error, when he insisted in an action, and obtained decret, against Ewart, before the admiral-court; for that the whole of his debt there pursued was contracted *in re mercatoria*; and in such causes the admiral has, beyond all controversy, an original jurisdiction.

The pursuers, having said thus much of the nature and consequences of the transaction with Mess. Hotchkis and Cleghorn, and of the diligence used by them, will proceed to make a like inquiry with respect to Mr Boyd, the brother-in-law of the bankrupt.

And here, in the entrance, it will be fit to observe, that Mr Boyd represents himself as totally estranged from Ewart the bankrupt, in consequence of some rupture between them, whereof the causes are not explained.

The pursuers have no opportunity of knowing whether a cordial and uninterrupted friendship subsisted between the two brothers; they learn however, from Mr Boyd's own production, that the two brothers had frequent intercourse together in the way of business. It appears, from Mr Boyd's own acknowledgment, that Ewart was his cautioner in a bank-credit: at what time this credit commenced, does not appear; certain it is, that it was not recalled in consequence of the supposed quarrel between Boyd and Ewart.

It appears, that on the 22d September 1762, Ewart became bound by his letter to pay to Boyd L. 49:9:7 Sterling; that, on the 14th December 1762, Ewart granted a promissory note to Boyd, for payment of L. 100 Sterling, as "the balance at settling *all* accounts" between them; that Ewart, on the 30th January 1764, indorsed to Boyd a bill accepted by one Armstrong; and that, on the 14th March 1764, he accepted a bill to Boyd for L. 114 Sterling.

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How far all this intercourse is consistent with the supposition of a subsisting quarrel between the brothers, is humbly submitted; and indeed it seems acknowledged by Boyd, that before Ewart's bankruptcy, a reconciliation had ensued.

It would seem, that the fruits of this reconciliation appear in the indorsements which Ewart made to Boyd in security of the debts which the pursuers must at present suppose were due to Boyd. In their account of this transaction, the two brothers vary. Ewart affirms, that he told Boyd, "He was in such a situation as obliged him to stop payment, and could do nothing for him; but if some bills could be of any use to him, he might take them;" and that accordingly he indorsed the bills. Boyd, on the contrary, affirms, That Ewart said he could not give him cash, but, which was the same thing, would give him bills, accepted by good men; that he was *surprised* to hear, that evening, or next day, that Mess. Hotchkis and Cleghorn were doing diligence against Ewart; and that, upon *inquiry*, he found that Ewart had stopped payment.

The pursuers will be bold to assert, that this *surprise* was affected, and *inquiry* concerning the state of Ewart's affairs altogether superfluous.

In a question among the creditors of Ewart, the account of a private conversation between Ewart and a creditor so nearly connected with him, is more credible as related by Ewart than as related by that creditor. But the matter rests not here; for Boyd himself implicitly confesses his knowledge of Ewart's condition, as will appear from the circumstances following. 1st, He confesses, that he went in the morning to demand payment from Ewart; and from comparing his account with the accounts given by Ewart, Mess. Hotchkis and Cleghorn, it is plain, that he went very early in the morning. Ewart was not at home, but Ewart's wife told Boyd, that she heard her husband say, "he was much straitened for money." 2^{dly}, When he met with Ewart on that

same morning, Ewart told him, "He could not give him cash, but, which was the same thing, he would give him bills accepted by good men." Here your Lordships will observe, that Boyd wanted cash, that Ewart acknowledged that he could not give him cash, but offered to give him an equivalent, bills accepted by responsible persons. If Boyd had no suspicion of Ewart's circumstances, why did he take upon himself the negotiating of those bills, instead of leaving them with Ewart? And if Ewart was a *good man*, what occasion was there to invert the security, and to have recourse to other *good men*? 3dly, If Ewart's credit had been entire in the person of Boyd, why was the sum of L. 280 due by *good men* indorsed either for payment or security of L. 220, the sum said to be owing by Ewart to Boyd? The difference is more than one fifth, or 20 *per cent.*; and Boyd has omitted to inform your Lordships on what account this *small* premium was given. 4thly, Boyd acknowledges, that Ewart left the bills for L. 280 in his possession, without so much as retiring the grounds of debt, or of taking a receipt for the bills so left; and "the *confusion* Ewart was in made him withdraw without doing it, *calling out, there were so many demands upon him.*" Here Ewart is in such confusion, that he omits taking either receipt for the debt or for the bills; although *in his own house*, he withdraws from his brother-in-law, the creditor; and leaves him with these remarkable, though abrupt words, *There are so many demands upon me!* Notwithstanding all this, Boyd had no suspicion of Ewart's circumstances; was *surprised* to hear in a few hours that Messrs. Hotchkis and Cleghorn, the creditors preferred *secundo loco*, were doing diligence; and learnt upon *inquiry*, that Ewart had stopped payment.

Parties are apt to see their own cause by a false light; and therefore the pursuers will not insinuate any thing which may reflect upon the candor of Boyd's narrative. Thus much, however, that very narrative, as confirmed by Ewart's

art's declaration, authorises them to say, that Boyd is mistaken, and that Ewart is in the right: for Boyd's narrative clearly shews, that he *was* at that very moment in the knowledge of Ewart's bankruptcy.

Had Boyd claimed upon his preference as arising from the indorsed bills, it is beyond all doubt that his claim would have been rejected, in a competition with the other creditors of Ewart. The statute 1696, and the decisions of your Lordships, together with the opinions of the Roman lawyers, which are used, not for authority, but for illustration, are so clear under this head, that it would be trespassing upon your Lordships indulgence, were the pursuers to insist upon them at greater length. Boyd indeed appears sensible of this; for, in the debate before the Lord Ordinary, he urged, that he was *ignorant of the law*; and believed the indorsations to be good until he was better informed. The pursuers cannot omit observing, that the defenders, in this case, acknowledge great ignorance of the law. Hotchkis being an Englishman urged, that he knew not what an execution of poinding was; Boyd believed, that the indorsation of bills in security or payment, made by a bankrupt at the very moment of his bankruptcy, were available. All this was owing to *ignorance of the law*. But it appears, that this ignorance is pleaded, not to excuse from penalties, but to establish a preference in their own favour over the effects of the bankrupt, to the prejudice of other creditors equally onerous.

It is said, That Boyd, upon being informed of his mistake in law, gave back the bills to Ewart, and then insisted in arrestments and forthcomings against the debtors in those bills. But this was not the method of atoning for his ignorance in law. It is humbly apprehended, that having once procured a transmission from the bankrupt, he was not at liberty to retrocess him; and in consequence thereof to attain, under the form of legal diligence, what by direct collusion he could not obtain. The argument used in the question with
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Mess. Hotchkis and Cleghorn does *a fortiori* apply to Boyd, whose knowledge of Ewart's debtors arose singly, by his own confession, from *this* circumstance, that Ewart indorsed to him the bills due by those very debtors.

Further, under this head, the pursuers will beg leave to observe, that Boyd, upon the principles of the act 1696, must shew, that he paid value for the bill of L. 114 Sterling, dated March 1764. It is not enough for him to say, that Ewart accepted this bill for value received. And the pursuers are the more inquisitive into the nature of this transaction, because they observe that Boyd has sought decret against Ewart for L. 49 : 9 : 7, as due by Ewart's letter dated September 1762, after that he had obtained decret for payment of Ewart's promissory note dated 1762, as the balance due at settling *all* accounts. When matters are conducted in this unaccountable way, it is necessary that the creditors of a bankrupt be upon their guard.

The pursuers are sensible that they have already trespassed too far upon the indulgence of your Lordships; and therefore will conclude with observing, that *they* are not pleading for any preference upon the effects of this unhappy man, James Ewart; they only seek to prevent the preference of some few favoured creditors, who used diligence, whether formal or informal, in virtue of private information received from the bankrupt himself, that "he was in such a situation as obliged him to stop payment."

In respect whereof, &c.

DAV. DALRYMPLE junior.

*This case does not come under either the Act 1621 or 4th Act 1696. -
w^h only regard voluntary conveyances not diligence done by Crs.
∴ Reduction here not competent.*

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